500-09-029541-216

COURT OF APPEAL OF QUÉBEC

(Montréal)

On appeal from a judgment of the Superior Court, District of Montréal, rendered on April 20, 2021, by the Honourable Justice Marc-André Blanchard.

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Nos. 500-17-109983-190 S.C.M. – 500-17-108353-197 S.C.M.
500-17-109731-193 S.C.M. – 500-17-107204-193 S.C.M.

L'ASSOCIATION DE DROIT LORD READING

APPELLANT
(Intervener)

c.

PROCUREUR GÉNÉRAL DU QUÉBEC

RESPONDENT
(Defendant)

- et -

ANDRÉA LAUZON
HAKIMA DADOUCHE
BOUCHERA CHELBI
COMITÉ JURIDIQUE DE LA COALITION INCLUSION QUÉBEC
ICHRAK NOUREL HAK
NATIONAL COUNCIL OF CANADIAN MUSLIMS (NCCM)
CORPORATION OF THE CANADIAN CIVIL LIBERTIES ASSOCIATION

IMPLEADED PARTIES
(Plaintiffs)

- et -

COMMISSION CANADIENNE DES DROITS DE LA PERSONNE
QUÉBEC COMMUNITY GROUPS NETWORK
MOUVEMENT LAÏQUE QUÉBÉCOIS

IMPLEADED PARTIES
(Interveners)

APPELLANT L'ASSOCIATION DE DROIT LORD READING'S BRIEF

Dated December 2, 2021

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TABLE OF CONTENTS

Appellant's Brief **Page**

TABLE OF CONTENTS

Appellant's Brief **Page**

TABLE OF CONTENTS

APPELLANT'S ARGUMENT

PART I – FACTS

1. L'Association de droit Lord Reading ("**Lord Reading**") had intervened before the Superior Court in support of Plaintiffs *Lauzon, et al.* contesting the *Loi sur la laïcité de l'État*, CQLR c. L-03 ("***Bill 21***"), and in order to present to the Court a perspective which it felt it would not otherwise have. **Lord Reading**, described in the Judgment dated April 20, 2021 ("**Judgment**") (para. 40) as an association of jurists, primarily, but not exclusively of the Jewish faith, has the pursuit and advancement of fundamental human rights as part of its mission.

2. **Lord Reading** incorporates herein by reference, the facts at paragraphs 1-72 of the Judgment, and save as noted below does not otherwise take issue or contest the description of relevant facts as related in the Judgment.

3. ***Bill 21*** upends a trajectory of recognizing, affirming, and, in **Lord Reading**'s view, constitutionalizing fundamental human rights in Québec and Canada of more than 200 years that the advent of either or both the *Québec* and *Canada Charters* neither began, extinguished nor froze.

4. The *Hart Act 1832*, and its subsequent iterations (hereinafter together referred to as the "***Hart Act***")[1], can be seen as the initiation point of this trajectory affirming and recognizing the fundamental human rights to emancipation, enfranchisement, equality and human dignity of a religiously visible minority, that has been in Québec, now, for more than 250 years[2], the first such recognition in the British Empire.

5. The Judgment did not reproduce the *Hart Act* as it was proclaimed on June 5, 1832. The version that was proclaimed in French on June 5, 1832, reproduced at para. 18 herein, provides intrinsic evidence that informs its purpose and effect pertinent to classifying it as a binding promise on the State of its behaviour towards its citizens

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1 The Judgment refers to the *Acte pour déclarer que les Personnes qui professent le Judaïsme bénéfice de tous les droits des autres sujets de Sa Majesté*, (1831) 1 Guill. IV c. 57; the *Act* as proclaimed in French, (1832) CAP LVII c. 56-57, appears at para. 17 herein.

2 Judgment, paras. 511-512, **Annexes conjointes (hereinafter "A.C."), vol. 1, pp. 110-111.**

and the corollary right of its citizens to expect nothing less than such behaviour from the State.

6. Subsequent iterations of the *Hart Act*, in particular, described as "droits politiques des juifs", in the statutes of the Province of Canada were and continued in force at and after Confederation.[3] **Lord Reading** contests the conclusions of the Judgment to the effect that the *Hart Act* was either rendered redundant/*caduque* by the *Civil Code* or by the *Rectories Act*[4] or legally revoked by the first consolidation of the Statutes of Québec and/or of Canada in 1888.[5]

7. On June 6, 2012, the National Assembly adopted a unanimous resolution to the effect that "l'Assemblée nationale souligne le 180e anniversaire de la Loi 1832 adoptée à l'unanimité, et la pleine émancipation politique et religieuse des juifs", as appears from the *Journal des débats* of that date filed as **Exhibit I-11** of **Lord Reading**'s Intervention[6]. Recognition of the *Hart Act*'s significance by the National Assembly and the short span of time until the substantive curtailment of these rights by ***Bill 21*** puts into question, *inter alia*, whether such rights are so unprotected, transitory and impermanent that they could be lawfully upended by the preemptive, simultaneous and concurrent use of the notwithstanding clauses of both the *Canada* and *Québec Charters*.

8. Beyond "freedom of religion", several provisions of ***Bill 21*** are/were contested as a serious and vital erosion of the "rule of law" and of Canada's constitutional order.

9. How ***Bill 21*** and, in particular, its ss. 6, 13, 14, 15 and Schedule II has and would be expected to impact members of the Barreau du Québec and the Ordre des avocats and who are religiously observant Jews, are described in the Affidavits of Me David Assor (para. 16) dated November 20, 2019[7], and Me Adam T. Spiro (paras. 5-14,

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3 Judgment, paras. 561-563, **A.C., vol. 1, pp. 125-126.**
4 Judgment, paras. 564-565, **A.C., vol. 1, p. 126.**
5 Judgment, para. 565, **A.C., vol. 1, p. 126.**
6 **A.C., vol. 5, p. 1253.**
7 Affidavit of Me David Assor dated November 20, 2019, para. 16, **A.C., vol. 4, p. 776.**

16-17) dated November 25, 2019[8], filed in support of **Lord Reading**'s Intervention, the aforesaid facts related therein being incorporated by reference. Omitted from consideration, these demonstrate the incoherence, subjectivity, ambiguities, inconsistencies in application, contradictory results, and vagueness of the prohibition set out at s. 6 of the aforesaid ***Bill 21*** and the effects expected to have upon religiously observant Jewish advocates and provide insight to such effects in addition to those described in the Affidavit of M[e] Gregory Bordan to which the Judgment refers.[9]

10. The Judgment refers to the Affidavit of Rabbi Alan W. Bright, dated November 22, 2019[10], but omits mention of other pertinent facts attested to thereat (paras. 6, 8-10, 16-17, 24-28[11]) which are therefore incorporated herein by reference.

JUDGMENT

11. Regarding **Lord Reading's** Intervention, the Judgment found:

> "[4]…
>
> - Les lois préconfédératives, en l'espèce *l'Acte de Québec de 1774*, la *Loi de 1852 sur les "rectoreries"* et la Loi Hart de 1832 ne permettent pas d'invalider les dispositions de la Loi 21;"
>
> - La règle du *stare decisis* fait en sorte que l'arrêt *Ford* doit recevoir application. Par conséquent, l'utilisation des clauses de dérogation par le législateur s'avère juridiquement inattaquable;
>
> - La conjugaison de l'effet du premier alinéa de l'article 8 de la Loi 21 et du premier paragraphe de son annexe III viole l'article 3 de la Charte canadienne, et en l'absence de toute prévue ou démonstration en vertu de l'article premier de la Charte, il s'ensuit une déclaration du caractère inopérant du premier paragraphe de l'annexe III de la Loi 21 vu l'article 52 de la Charte;"

12. As regards the *Hart Act,* specifically, the Judgment found:

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8 Affidavit of M[e] Adam Spiro dated November 25, 2019, paras. 5-14, 16-17, **A.C., vol. 4, pp. 781-783.**
9 Judgment, para. 64, **A.C., vol. 1, p. 17.**
10 Judgment, para. 768, **A.C., vol. 1, p. 165.**
11 Affidavit of Rabbi Alan W. Bright dated November 22, 2019, paras. 6, 8-10, 16-17, 24-28, **A.C., vol. 4, pp. 778-780.**

> "[564] Enfin, en 1888, la première refonte postconfédérative des lois du Québec omet l'inclusion de la disposition équivalant à la Loi Hart. Cela s'explique par deux évènements législatifs : (1) l'adoption de la Loi sur les « rectoreries » en 1852 et (2) l'adoption du *Code civil* du Bas-Canada en 1866. Ces deux lois affirment, d'une part, l'égalité juridique de toutes les dénominations religieuses et, d'autre part, la reconnaissance que chaque personne possède « la pleine jouissance des droits civils ».
>
> [565] Par leur effet combiné, ces deux lois rendent caduques les dispositions de la Loi Hart sur les droits civils et politiques des Juifs au Bas-Canada. Conséquemment, la disposition refondue en 1861 se trouve abrogée dans le cadre de la refonte des Statuts révisés de la Province de Québec de 1888."

13. With respect to what the Trial Judge termed "la question à savoir si une loi peut s'avérer si imprécise qu'un tribunal doit le déclarer inconstitutionnel" he applied *R. v. Nova Scotia Pharmaceutical Society*[12] stating "En effet le débat judiciaire ne requiert pas beaucoup plus que deux partis possédant une vision différente du même objet, en l'espèce un objet législatif,"[13] adding "À ce stade-ci, il apparaît téméraire pour le Tribunal de conclure que l'application de la *Loi 21* ne mènera, nécessairement et de façon systématique, qu'à des interprétations incongrues ou illogiques".[14]

14. The Judgment does not measure the discretion provided at ***Bill 21***'s s. 13, 1st paragraph, against the absence of "lignes directrices ministérielles", uniform standards, and the absence of a framework for authorization or review, and in particular, omits reference to guidance provided by *Vic Restaurant v. City of Montreal*[15].

15. The present Appeal challenges each of these conclusions.

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12 *R. v. Nova Scotia Pharmaceutical Society*, [1992] 2 S.C.R. 606 [*Nova Scotia Pharmaceutical Society*].
13 Judgment, para. 672, **A.C., vol. 1, p. 147.**
14 Judgment, para. 674, **A.C., vol. 1, pp. 147-148.**
15 *Vic Restaurant Inc. v. City of Montreal*, [1959] S.C.R. 58 [*Vic Restaurant*].

PART II – ISSUES IN DISPUTE

A
1. Violation des Lois Préconfédératives

1.2 Violation de la *Loi Hart*

1.2a)(i) Was the purpose and effect of the *Hart Act* properly assessed and classified simply as legislation in relation to "freedom of religion"?

1.2a)(ii) Did the Judgment correctly decide that though the *Hart Act* remained in force after Confederation it had already been rendered redundant/*caduque*?

1.2a)(iii) Did the Judgment correctly decide that the *Hart Act* was revoked by the consolidation of Statutes of Québec and Canada of 1888?

1.2a)(iv) Do ***Bill 21***'s provisions ignore and violate enforceable fundamental human rights and corollary "droits politiques" that the *Hart Act* recognized and affirmed?

B
2. Violation de la primauté du droit – le caractère imprécis, arbitraire et incohérent de la *Loi*

2.2.1 La *Loi* est imprécise et arbitraire

2.2.1a) **Did the Trial Judge correctly describe the test(s) and threshold(s) for impermissible imprecision and impermissible delegated discretion and properly apply them to the factual and legal constraints of the matter(s) before him?**

2.2.1b) Applying the correct tests, do ss. 6 and 13 of ***Bill 21*** create and allow for prohibitions and delegated authority so impermissibly imprecise and arbitrary such that each individually, or both taken together, offend the rule of law and are "*ultra vires*"?

C

4. Violation de l'article 3 de la *Charte canadienne* – éligibilité aux élections provinciales

4.4 Le Juge erre en refusant de conclure que l'article 6, et, les paragraphes 1 et 6 de l'Annexe II de la *Loi 21* violent l'article 3 de la *Charte canadienne.*

4.4a) Does the exclusion of duly elected MNA's who wear religious symbols from consideration for and/or accession to the positions of President and Vice-President of the National Assembly or Minister of Justice violate s. 3 of the *Canada Charter*?

D

5. Recours injustifié aux clauses dérogatoires

5.1 Le juge erre en concluant que l'arrêt *Ford* dispose de la question du recours aux clauses dérogatoires.

5.1a) Was the Trial Judge correct in determining that *Ford v. Quebec (Attorney General)* and vertical *stare decises* was dispositive of any challenge to Québec's simultaneous, concurrent preemptive and *holus bolus* recourse to the notwithstanding clauses of both the *Canada* and *Québec Charters*?

5.1b) Does the "sterilization" and/or "suspension" as respects ***Bill 21***, of all of the fundamental rights set out at ss. 1-38 of the *Québec Charter* and ss. 2 and 7-15 of the *Canada Charter*, create impermissible *(i)* restraints to access to justice and *(ii)* reduction of and interference with the core competence of the Superior Court in violation of s. 96 of the *Constitution Act, 1867*?

PART III – SUBMISSIONS

1. Violation des Lois Préconfédératives

1.2 Violation de la *Loi Hart*

1.2a(i) Was the purpose and effect of the *Hart Act* properly assessed and classified simply as legislation in relation to "freedom of religion"?

16. The Trial Judge dismissed the *Hart Act*[16] as simply:

> "… un état important de l'histoire du… mais elle ne permet pas de soutenir qu'elle instaure une protection distincte de la liberté de religion au Canada ou à Québec qui échapperait au régime expressément prévu dans les chartes…"[17] (our emphasis)

Misplaced focus by the Trial Judge simply on "liberté de religion" ignores the *Hart Act*'s purpose and full significance. The *Hart Act* legislated recognition of corollary fundamental human rights of political emancipation, enfranchisement and dignity of, in one sense, a religiously visible minority, into the legal order of Canada's nascent democracy – a first in the British Empire. Its significance as initiator of a trajectory of recognition of these fundamental human rights was not explored. The Judgment's premise is that "freedom of religion" of Québec's minorities, however the right is articulated or the religion "professed"[18]: *(i)* could be revoked by the Province prior to both *Charters*' advent[19] and *(ii)* has been exhaustively captured by both of them since. Therefore, for the Trial Judge, the *Hart Act* has no more than limited historical interest. But in the context of ***Bill 21***, reference to the *Hart Act* raises profound questions, that were not canvassed and in particular: *(i)* whether recognition of fundamental political rights, that speak to the enfranchisement and the dignity of

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16 *Acte pour déclarer que les Personnes qui professent le Judaïsme bénéfice de tous les droits des autres sujets de Sa Majesté*, (1831) 1 Guill. IV c. 57.

17 Relying only upon extracts of the *Hart Act*, the Trial Judge at para. 560 states: "Le titre et l'unique disposition de la Loi Hart se montrent révélatoires." The text reproduced herein in its entirety at para. 18 explains the *Hart Act*'s purpose and legal impact differently, and more correctly, then simply to, as he put it "affirmer l'égalité juridique des personnes juives", **A.C., vol. 1, p. 125.**

18 The term "professed" refers to the specific terms of the *Hart Act*, i.e. "professant le Judaïsme".

19 The Judgment addresses the redundancy and repeal of its last iteration at paras. 564-565, **A.C., vol. 1, p. 126.**

religious minorities that predate Confederation could be revoked or retracted by a provincial legislature before or after either *Charter*; *(ii)* if they could, whether doing so concurrently with the suspension of virtually every other fundamental freedom set out in both the *Québec* and *Canada Charters* changes the calculus and *(iii)* whether the rights that s. 3 of the *Canada Charter* protect are exhaustive of any and all such previously legislated and recognized political rights?

17. In its entirety, the *Hart Act* provided:

> "Vu qu'il s'est élevé des doutes, si par la Loi, les personnes qui professent le Judaïsme ont le droit à plusieurs des privilèges dont jouissent les autres sujets de Sa Majesté en cette Province : - Qu'il soit donc déclaré et statué par le Très-Excellente Majesté du Roi, par et de l'avis et consentement du Conseil Législatif et de l'Assemblée de la Province du Bas-Canada, constitués et assemblés en vertu et sous l'autorité d'une Acte passé dans le Parlement de la Grande-Bretagne, intitulé, « Acte qui rappelle certaines parties d'un Acte passé dans la quatorzième » année du Règne de Sa Majesté, intitulé, *Acte qui pourvoit plus efficacement pour Gouvernement de la Province de Québec dans l'Amérique, Septentrionale*, et « qui pourvoit plus amplement pour le Gouvernement de la dite Province; » - Et il est par le présent déclaré et statué par la dite autorité, que toutes personnes professant le Judaïsme, et qui sont nées sujets Britanniques, et qui habitent et résident en cette Province, ont droit, et seront censées, considérées et regardées comme ayant droit à tous les droits et privilèges des autres sujets de Sa Majesté, Ses Héritiers et Successeurs, à toutes intentions, interprétations et fins quelconques, et sont habiles à pouvoir posséder, avoir ou jouir d'aucun office ou charge de confiance quelconque en cette Province."[20] (our emphasis)

Following the Union of Upper and Lower Canada, the substance of the *Hart Act* remained unchanged but its purpose was clearly defined as "droits politiques des juifs".[21] The Trial Judge should have, but did not, recognize these rights as being of

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20 The text herein reproduces the entirety of the *Hart Act* as proclaimed in (1832) CAP LVIII c. 56-57, including both its substantive text and preamble.

21 Judgment, paras. 561-563, **A.C., vol. 1, pp. 125-126**; "Lors de la codification suivante des lois applicables au Bas-Canada en 1861, la loi s'intègre comme une disposition particulière de l'*Acte concernant certains droits personnels* [403] se trouvant au titre 6 de la codification intitulé « Droits d'une nature privée et personnelle ». La disposition pertinente, reprenant le principe de la *Loi Hart*, se lit : Droits politiques des juifs « 7. Toutes les personnes qui professent le Judaïsme, et qui sont nées sujets Britanniques, et qui habitent et résident en cette province, peuvent jouir de tous les droits et privilèges des autres sujets de Sa Majesté, à toutes fins et intentions quelconques, et occuper des places ou charges de confiances en cette province. »" (our emphasis)

a different order, enfranchising Jews with substantive political rights even while manifesting their Judaism openly and without restriction as to how, when or where they would do so. He correctly notes that pursuant to s. 129 of the *Constitution Act, 1867*, these "droits politiques" remained in full force at and after Confederation, but incorrectly limits what they articulate and their constitutional impact.

18. At para. 560, the Judgment declares that the *Hart Act* serves to "affirmer l'égalité juridique des personnes juives", recognizing its emancipatory aspect, but restricted the full scope and impact that its provisions rightfully intend. The *Hart Act* recognized and affirmed fundamental human freedoms and created corollary political and enfranchising rights, of no lesser constitutional importance, to the effect that "toutes personnes professant le Judaïsme…sont habiles à pouvoir posséder, avoir ou jouir d'aucun office ou charge de confiance quelconque en cette Province". These enfranchising rights were restated in subsequent versions with the same substantive language but under the heading "droits politiques des juifs".[22] These rights continued in force after Confederation and are those that the contested provisions of ***Bill 21***, and in particular, ss. 6, 13, 14, 15 and Schedule II, violate directly and peremptorily.

19. Specifying that those "professant le Judaïsme" were "…habiles à pouvoir posséder, avoir ou jouir d'aucun office ou charge de confiance quelconque…", the *Hart Act* dismissed the canard and trope that Jews, as aliens and non-Christians, were unworthy of holding positions of trust in government and guaranteed that professing their Judaism openly and without restriction as to where, when and how it would be manifested, as of right, would not exclude them from "any position of trust". Its purpose as seen from its preamble, "… qui pourvoit plus amplement pour le gouvernement de ladite province", makes it a "convention of governance – convention de gestion publique", closely linked to the "rule of law".[23] Read together, these provisions represent the statutory expression of essential elements of the "rule

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22 Judgment, paras. 560-564, **A.C., vol. 1, pp. 125-126**; *Actes et ordonnances révisés du Bas-Canada* (1845), Classe A, No. 6 (Juifs, leurs droit politiques); *Acte concernant certains droits personnels*, S.R.B.C. 1861, c. 34.

23 This term is used by Lamer C.J.C. in *MacMillan Bloedel Ltd. v. Simpson*, [1995] 4 S.C.R. 725, para. 40 in connection with "le principe de la primauté du droit".

of law", providing by its terms, *(i)* equality before the law, *(ii)* the creation of an actual order of positive law and, *(iii)* by specifically stipulated guarantees, having an avowed governmental purpose, an objective standard for oversight by the judiciary.

20. While impetus for the *Hart Act* was the expulsion from the Legislature of Ezekiel Hart some decades earlier, as described by the Trial Judge[24], the legislator chose a remedy that was not limited to removing the problematic portions of the Oath of Office.[25] It chose broad emancipating and enfranchising language that spoke to fundamental human values and created substantive political rights.[26] The fact that the *Hart Act* was adopted "…sous l'autorité d'une Acte passé dans le Parlement de la Grande-Bretagne…", as its preamble states, adds constitutional gravitas.[27] Being classified, after the *Act of Union*, under the heading "droits politiques des juifs" further defines their constitutional character because they modulate rights of the citizen vis-à-vis the State, and, conversely, how they, in turn will be treated as citizens.

21. As defined in *Re Manitoba Language Rights*[28]: "The Constitution of a country is a statement of the will of the people to be governed in accordance with certain principles held as fundamental and certain prescriptions restrictive of the powers of the legislature and government." Described as "droits politiques des juifs", the *Hart Act* and its subsequent iterations in 1845 and 1861 fall neatly within such definition. The Judgment makes no attempt to measure or relate these rights by or to that definition. Political emancipation: *(i)* declared by legislation; *(ii)* enacted under

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24 Judgment, paras. 512, 559-560, **A.C., vol. 1, pp. 110-111, 125.**

25 Judgment, para. 512, **A.C., vol. 1, pp. 110-111**: "Cependant, contrairement aux catholiques canadiens qui se voient accorder par l'Acte de Québec le droit de faire partie du Conseil législatif, la situation des juifs demeure incertaine en raison d'une loi impériale de 1766 imposant le serment d'office ("state oaths") finissant par les mots "sur la foi véritable d'un Chrétien" [346], d'où la nécessité de l'adoption de la *Loi Hart* en 1832." (our emphasis)

26 The United Kingdom in adopting *An Act to provide Relief of her Majesty's subjects professing the Jewish Religion*, 21 & 22 Vict. c. 49, styled later the *Jews Relief Act 1858*, chose simply to change the oath. The enfranchisement of Jews was generalized, save for certain positions. Full enfranchisement was effected by adoption of the *Promissory Oaths Act of 1871*, 34 & 35 Vict. c. 49 after which "…every office, the throne alone excepted could be legally filled by a Jew…" H.S.Q. Henriques, "The Political Rights of the English Jews", (Jan. 1907) 19:2 *The Jewish Quarterly Review* 298.

27 *Saumur v. City of Quebec*, [1953] 2 S.C.R. 299, p. 363 [*Saumur*].

28 [1985] 1 S.C.R. 721, p. 745.

authority of the Parliament of Great Britain; *(iii)* adopted to remove impediments to such political emancipation; *(iv)* that arose from a pre-existing Imperial Statute; *(v)* that result from the "profession" of their religion; *(vi)* affirming and providing newly created specific enfranchising rights; *(vii)* expressed as including the right to hold and enjoy "any position of trust" and *(viii)* adopted to "make further provisions for the government of the Province of Québec" can only equate to fundamental rights that then form part of the "rule of law", implicit in Canada's Constitution and constitutional order in 1867 and thereafter. Canada and its constituent Province of Québec were therefore obliged to respect them, given their purpose and role. To hold otherwise is to reduce legislative emancipation and enfranchisement, and the corollary human rights they acknowledge and create, to transitory and revocable guarantees of mere tolerance, dependent on the will of the current legislature's composition. Their fundamental character at least conditions and informs the Constitution[29] and in particular, "rule of law" to which it makes reference.

22. The "droits politiques des juifs" created by the *Hart Act* and its status as a "convention de gestion publique – convention of governance" suggests that it was an early articulation of the democratic right to "effective representation" that s. 3 of the *Canada Charter* embodies.

1.2a(ii) Did the Judgment correctly decide that though the *Hart Act* remained in force after Confederation it had already been rendered redundant/*caduque*?

23. The Judgment states at para. 564 that:

> "… (1) l'adoption de la Loi sur les « rectoreries » en 1852 et (2) l'adoption du *Code civil* du Bas-Canada en 1866…affirment d'une part, l'égalité juridique de toutes les dénominations religieuses et,

[29] The Supreme Court has concluded that the honour of the Crown and the obligation that it entails is *sui generis*. (See: *Toronto (City) v. Ontario (Attorney General)*, 2021 SCC 34, para. 62). Does this mean that the State in this case Québec, is free to disenfranchise some of its citizens of political rights it has promised to respect? Québec's constitution is and always was subject to the same conditions as that of Canada's subject to both "rule of law" and the need for symmetry with a Constitution similar in principle to that of the U.K.

> d'autre part, la reconnaissance que chaque personne possède « la pleine jouissance des droits civils ».” (our emphasis)

The Judgment wrongly interprets the term “civil rights” as if they could embrace the “droits politiques” noted above. The Judgment cites directives of the Supreme Court to the effect that the modern association of the term “civil rights” with fundamental freedoms does not reflect the context of s. 92(13) of the *Constitution Act, 1867* which relates “plutôt au domaine du droit privé”.[30] The *Civil Code of Lower Canada (1866)* is the supreme example of the exercise of provincial authority with respect to “private law” pursuant to s. 92(13). These “droits politiques” were of a different order, not addressed by the *Civil Code* of the time. Mignault specifies that “les droits sont les facultés et avantages que les lois accordent aux personnes” that differ between rights that are “civiles, politiques ou publics”. “Droits civils” speak to “des rapports de particulier à particulier” unlike the “véritables droits politiques” which one exercises “pour prendre part au gouvernement du pays”.[31] The rights provided by the *Hart Act* fall into the latter category. How political rights, being part of “public law”, that survived Confederation could be rendered superfluous or redundant by the codification of Québec “private law” that came into force in 1866 remains unexplained!

24. The Trial Judge notes that “à ce propos, on constate d'ailleurs que le *Code civil* ne comporte aucune référence à la religion en tant que telle”. The incongruity of the absence of any reference to both religion and the aforesaid “droits politiques” in the same *Civil Code* that rendered them “caducs” is not addressed.[32] The *Rectories Act's* recognition of “l'égalité juridique de toute les dénominations religieuses”[33] does not equate to rendering these “droits politiques des juifs” redundant, even if they were so reaffirmed, post-1861, in the *Acte concernant certains droits personnels.*[34]

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30 Judgment, para. 394, **A.C., vol. 1, pp. 80-81.**

31 Pierre-Basile Mignault, *Le droit civil canadien,* vol. 1, Montréal, Librairie de droit et de jurisprudence, 1895, p. 131, as cited by Kellock J. in *Saumur*, *supra* note 27, p. 348 See: Rand J., p. 329, Estey J., p. 359; Locke J., p. 375.

32 Judgment, para. 565, **A.C., vol. 1, p. 126.**

33 Judgment, paras. 534, 564, **A.C., vol. 1, pp. 117-118, 126.**

34 S.R.B.C. 1861, c. 34; Judgment, para. 562, **A.C., vol. 1, pp. 125-126.**

These "droits politiques" do not address "des rapports de particulier à particulier" or erase their purpose to "…prendre part au gouvernement du pays" by simply labelling them "droits personnels".

25. The Judgment attributes to the Preamble of the *Rectories Act* that provides: "the free exercise of Religious Profession and Worship without discrimination or preference…", the ability to render superfluous or redundant emancipatory political rights, wrongly confusing rights that have distinct effects and consequences. The "free exercise of Religious Profession and Worship without discrimination or preference" does not equate to the enfranchising political rights of the *Hart Act* or its successors. In the *Rectories Act*, it is the "freedom" to exercise religious worship and the juridical equality of the religions themselves that the legislation speaks to. The Judgment notes at para. 540 "…il faut savoir qu'en 1852, la constitution de la Province du Canada est l'*Acte d'union, 1840*, qui prévoit à l'article XLII le libre exercice de la religion…". Why, then, would the provisions of the *Hart Act* be recast twice in successive statutes following the *Act of Union*[35], always under the heading of "droits politiques des juifs", if they speak to "freedom of religion" already covered in the Province of Canada's Constitution, and to nothing more?

1.2a(iii) Did the Judgment correctly decide that the *Hart Act* was revoked by the consolidation of Statutes of Québec and Canada of 1888?

26. The Judgment found that these "droits politiques des juifs" continued in force after Confederation via s. 129 of the *Constitution Act, 1867*, but had been rendered redundant and were effectively repealed by the combined effect of the first consolidation of statutes of Québec and Canada respectively. Both redundancy and lawful repeal are open to question.

27. "To be official a consolidation must be enacted or otherwise given the status of law".[36] "The effects of a statute revision are governed first and foremost by the

35 Judgment, paras. 561-562, **A.C., vol. 1, pp. 125-126.**
36 Ruth Sullivan, *Sullivan on the Construction of Statutes*, 6th ed., Toronto, LexisNexis, 2014, s. 24.49, p. 739.

particular legislation that authorizes the revision and authorizes its coming into force".[37] Furthermore: "Generally speaking, statute revisions are meant to have limited legal effect…", "…the exercise of repeal and re-enactment that occurs in a statute does not affect the temporal operation of the law included in the revision…thus the date of commencement of each provision in force remains what it was prior to revision…".[38] In any case, the legal effect of any repeal via consolidation of statutes is dependent upon which level of government, if any[39], had such authority.

28. The ability of the consolidation of Québec statutes in 1888 to abrogate such "droits politiques" is limited by the Preamble of its enabling statute, the first paragraph of which limits its effects to statutes "…qui sont du ressort de sa législature", and in addition by its s. 7(c).[40] Whether the "droits politiques des juifs" could be abrogated by the "Refonte" of 1888 and its Appendices, is governed by the limiting language and effect of all of these and how they harmonize with the *Constitution Act, 1867* including its s. 129.

29. The enabling statute clearly limits the subject matter to pre-existing statutes of general character of the former Province of Canada "qui affectent le Province de Québec et sont du ressort de sa législature". Having been adopted "…sous l'autorité d'une Acte passé dans le Parlement de la Grande-Bretagne" its subsequent iterations are to be considered as the continuation and product of the same statute.

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37 *Ibid.*, s. 24.54, p. 740; Pierre-André Côté and Mathieu Devinat, *Interprétation des lois*, 5th ed., Montréal, Thémis, 2021, paras. 196-199; What is authorized is governed by the enabling statutes "elle peut élaguer les dispositions mortes, améliorer le style, réconcilier les dispositions apparemment incompatibles, mais elle n'est pas censée modifier le fond". (our emphasis)

38 Ruth Sullivan, *supra* note 36, s. 24.55, p. 74; Pierre-André Côté and Mathieu Devinat, *supra* note 37, para. 206: "Le texte refond ne doit pas être considérée comme une loi nouvelle."

39 *Saumur*, *supra* note 27, p. 363, Locke J., after deciding that because of the preamble to the Constitution, the *Rectories Act* could not be abrogated by the Province of Québec added: "Whether it would be *ultra vires* of Parliament to repeal the Act, in view of the language of the preamble to the British North America Act is a matter to be decided when the question arises. It does not arise in the present case. Parliament has passed no legislation purporting to repeal the Act.". (our emphasis)

40 *Statuts refondus de la province de Québec*, (1887) 50 Vict. c. 5, styled "Acte concernant les status refondus de la Province de Québec", must be read together with *Statuts refondus de la province de Québec,* (1888) 51-52 Vict. c. 2, in view of Section 3 thereof providing "Le présente acte sera considéré comme amendement à l'acte 50 Vict. Chap.5 dont il ne sera que corolaire; et en conséquence les deux actes n'en formeront qu'une".

Does the text of s. 129 and the limitations of the amending authority of either level of government that exclude Acts "…such as are enacted by or exist under *Acts of Parliament of Great Britain*…" place the *Hart Act* outside the "ressort de sa législature"?[41]

30. Furthermore, the Parliament of Great Britain enacted the *Jews Relief Act* in 1858[42], further amended to provide full emancipation in 1871.[43] Does the political emancipation and enfranchisement of Jews in Great Britain, prior to Confederation and to the consolidation of 1888, become further elements of constitutional "*convention of governance – convention de gestion*" incorporated into Canada's Constitution, and by extension to that of each of its constituent Provinces, as part of the "rule of law" and by reference to a Constitution "similar in principle to that of the U.K."?[44] While as a consequence of symmetry, these British statutes emancipating Jews *per se* are not incorporated, the principles that underlie them may be.[45] Those principles included the enfranchisement of Jews and, at least after 1871, their ability to be considered for any position irrespective of their religious adornments save that of the Sovereign.[46]

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41 The Judgment refers to Appendix A of the enabling legislation as authority for the repeal of its last iteration contained in the *Act concerning certain personal rights* in which the *Hart Act*'s substantive provisions were included. Appendix A itself specifies that the abrogation of statutes or parts thereof are limited by the words "…en autant que ces lois et parties de loi se rapportent à la Province de Québec et sont de la compétence de sa législature". As regards the Judgment's reference to Appendix B and the marginal notation of O.A. ("objet accompli") (i) only Appendix A is mentioned in the empowering statute(s); (ii) even with respect to Appendix A it specifies "les notes marginales et les dispositions en italiques imprimés sur tel rôle, les renvois aux dispositions antérieur à la fin de chaque article et les notes explicatives insérés par les réviseurs… ne formeront pas parties ces statues… The marginal notes contained in Appendix B are of no significance.

42 *An Act to provide for the Relief of her Majesty's Subjects professing the Jewish Religion*, (1858) 21-22 Vict. c. 49.

43 H.S.Q. Henriques, *supra* note 26, pp. 338-339.

44 *Saumur*, *supra* note 27, Locke J., p. 363; he continued at p. 372 that at Confederation "the Act of 1852 declaring the right of religious belief and worship was in force and gave to the inhabitants of the provinces the same rights as were then enjoyed by the people of the United Kingdom." He continued that this was a "constitutional right of all the inhabitants of this country" and that these rights could not be limited save by the federal power under s. 91(27). The emancipation and political enfranchisement of Jews in 1858 become a relevant consideration.

45 *Motard v. Attorney General of Canada*, 2019 QCCA 1826, paras. 57-63.

46 H.S.Q. Henriques, *supra* note 26, pp. 338-339.

31. The enabling statute of Québec's 1888 Consolidation provides at s. 7(c) that "L'abrogation de ces actes et parties des actes n'invalidera les "droits"… "privilèges" …. "habilités"…, établis ou existants à l'époque de telle abrogation". The "droits politiques des juifs", even placed within a statute styled "droits personnels", retain their status as "droits" "habilités" and/or "privilèges" that were "existants à l'époque de telle abrogation" that the "refonte" did not therefore invalidate!

32. In sum, the Judgment ignores and fails to address the limitations that the enabling statute that authorized the "refonte" contains, erring fundamentally in its legal effects.

33. As to the absence of the *Hart Act* in the S.R.C. 1888 and the apparent attribution of same in one or more of is Appendices as being within the "puissance" of the Province[47], the "remarques" in such Appendices are no more than non-binding directions to redactors. Furthermore, consent cannot confer jurisdiction where none exists.[48] Inter-delegation of powers between federal and provincial legislators is prohibited.[49] By the consolidation of statutes in 1888, Canada could not divest itself of any constitutional competence in favour of the Province. That "À la suite du partage de compétences législatives en 1867, les matières religieuses se retrouvent dans les législations provinciales"[50] does not change the constitutional landscape.

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47 S.R.C. 1888, Vol. II, Appendice 1, p. 9.

48 *British Columbia (Attorney General) v. Lafarge Canada Inc.*, [2007] 2 S.C.R. 86, para. 88; *Ontario Hydro v. Ontario (Labour Relations Board)*, [1993] 3 S.C.R. 327 at p. 357. "Il n'existe aucune théorie du manque de diligence en matière de partage constitutionnel des compétences; l'omission d'un palier de gouvernement d'exercer sa compétence, ou l'omission d'intervenir lorsqu'un autre palier de gouvernement exerce cette compétence, ne saurait être déterminante en ce qui concerne l'analyse constitutionnelle. À cet égard, je ferais miens les propos du juge Reed dans l'arrêt *Alberta Government Telephones c. Conseil de la radiodiffusion et des télécommunications canadiennes*, [1985] 2 C.F. 472 (1re inst.), à la p. 488: Le fait qu'une compétence constitutionnelle n'est pas exercée pendant de longues périodes, ou est irrégulièrement exercée, ne signifie pas que s'opère par le fait même une forme de prescription acquisitive. (See: *Procureur général du Manitoba c. Forest*, [1979] 2 R.C.S. 1032, pour une affaire dans laquelle un comportement inconstitutionnel demeura incontesté pendant quatre-vingt-dix ans.)" See also: *Manitoba Metis Federation Inc. v. Canada (Attorney General)*, [2013] 1 S.C.R. 623, para. 153; *Reference re Securities Act*, [2011] 3 S.C.R. 837, para. 116.

49 *Attorney General of Nova Scotia v. Attorney General of Canada*, [1951] S.C.R. 31, para. 34: "No power of delegation is expressed under section 91 or in section 92 nor indeed is there one of accepting delegation"; *R. v. Furtney*, [1991] 3 S.C.R. 89 confirms the rule.

50 Judgment, paras. 537; see also paras. 541, 544-545, 564, **A.C., vol. 1, pp. 118-121, 126.**

Whether Québec can, pursuant to any of the heads of power under the Constitution, limit "freedom of religion" as it did, is the subject of other companion appeals.

1.2a)(iv) Do *Bill 21*'s provisions ignore and violate the fundamental human rights and corollary "droits politiques" that the *Hart Act* recognized and affirmed?

34. If the "droits politiques des juifs" were rendered redundant prior to 1888, it was neither because of the *Civil Code of Lower Canada 1866* nor the *Rectories Act*. These "droits politiques des juifs" had at Confederation constitutional character, significance and impact. They represent the statutory expression of core democratic rights and values that both *Charters* may have expanded, but that neither has suppressed.[51] They were incorporated into Canada's Constitution implicitly as a supplementary statutory instrument or by the foundational precepts of the "rule of law" and the necessary symmetry of a Constitution "similar in principle" to that of the U.K. ***Bill 21*** cannot escape constitutional scrutiny under that lens by invoking the notwithstanding clauses pre-emptively.

35. The Resolution of the National Assembly of June 6, 2012, provided that "l'Assemblée nationale souligne le 180e anniversaire de la *Loi de 1832*, adopté à l'unanimité, et la plein émancipation politique et religieuse des juifs". It legitimately forms part of the "preuve extrinsèque de documentation législative et/ou gouvernementale"[52] defining the *Hart Act*'s "pith and substance" as emancipatory and enfranchising. Rights that emancipate and enfranchise are the bedrock of representative government and are, *per se,* a part of the Constitution of any state, by identifying the manner and extent to which its citizenry may participate in governance. Perhaps that is why s. 3 of the *Canada Charter* is beyond the reach of its "notwithstanding" clause.

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51 *Charter of Human Rights and Freedoms*, CQLR c. C-12, art. 50; *Constitution Act, 1982*, enacted as Schedule B to the *Canada Act 1982*, 1982, c. 11 (U.K.), art. 26.

52 *Reference re Genetic Non-Discrimination Act*, 2020 SCC 17, para. 34.

36. In force at Confederation, these rights defined the full extent to which a minority in Québec might participate in governance. They were and remained, by way of s. 129 of the *Constitution Act, 1867*, as much a part of Canada's Constitution as they were of Lower Canada's when they were first promulgated. That they enfranchised and emancipated only part of Canada's population does not change their constitutional impact. The *Hart Act* is a key reference point in the trajectory of Québec and Canada's recognition of fundamental core values and human rights, a trajectory which later included other and complimentary legislation such as the aforesaid *Rectories Act* and *Québec Charter*. Affirming other rights therein neither exhausted nor suppressed these rights, but added to them. Québec cannot turn back the clock almost 200 years and revoke fundamental political rights of a religious minority to hold "any position of trust" while manifesting their religion openly when such rights were recognized and affirmed in legislation by which it was and remained bound.

37. Reference to the *Hart Act*, however, is not intended to seek a constitutional exemption for Jews. If the contested provisions of ***Bill 21*** fail to pass the constitutional bar, they are to be declared inoperative to the benefit of all. Constitutionality of legislation cannot be relativized on the basis of who raises the constitutional impediment.

2. Violation de la primauté du droit – le caractère imprécis, arbitraire et incohérent de la *Loi*

2.2.1 La *Loi* est imprécise et arbitraire

2.2.1a) Did the Trial Judge correctly describe the test(s) and threshold(s) for impermissible imprecision and impermissible delegated discretion and properly apply them to the factual and legal constraints of the matter(s) before him?

38. *Vavilov* instructs that "une décision raisonnable doit être fondée sur une analyse intrinsèquement cohérente et rationnelle et est justifiée au regard des contraintes

juridiques et factuelles auxquelles le décideur est assujetti" (para. 85).[53] Respectfully, the Trial Judge's treatment of ss. 6 and 13 of ***Bill 21***[54] under heading "Le caractère imprécis et incohérent de la *Loi 21*"[55], is contradictory and incomplete. The Judgment reviews the ambiguity of the term "religious symbols - signes religieux" hermetically without taking account of *(i)* the equal ambiguity of the other terms that describe the prohibition created in s. 6, *(ii)* the absence of legislative or ministerial guidance with respect to its enforcement or application pursuant to s. 13, 1st paragraph, and *(iii)* the adverse and contradictory effects that result therefrom without recourse to a "débat judiciaire" because of the "sterilization" of almost the entirety of the fundamental rights that the *Québec* and *Canada Charters* embrace.

39. In *Delta Air Lines*, the unreasonability was made evident by the decision's insistence upon a test for "public interest" that it deemed essential but which was impossible to satisfy:

> "L'imposition d'un test auquel il est impossible de satisfaire ne peut pas être ce que voulait le législateur lorsqu'il a conféré à cet organisme administratif le large pouvoir discrétionnaire de décider s'il entendra des plaintes."[56]

The present Judgment's reasoning is equally problematic.

40. The Judgment correctly found that ***Bill 21*** "sterilizes" all the substantive rights set out in both *Charters* described as "*a priori exhorbitante*"[57] including, necessarily, the judicial rights set out at s. 23 of the *Québec Charter* that speaks to the right of every citizen to a "full and equal" "public and fair hearing" before an "impartial tribunal"…for the determination of his rights and obligations! Pursuant to the ***Bill***'s Preamble, the suspension/sterilization of such rights is declared to be *(i)* "paramount" and *(ii)* part

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53 *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 [*Vavilov*] (our emphasis); *Delta Air Lines Inc. c. Lukács*, [2018] 1 S.C.R. 6 ("*Delta Air Lines*"); In *Vavilov*, para. 87, the Court explains, citing *Delta Air Lines* that "Dans cette affaire, même si le résultat de la décision n'était peut-être pas déraisonnable eu égard aux circonstances, la décision a été infirmée parce que l'analyse ayant débouché sur ce résultat était déraisonnable."

54 Judgment, section 9.2.1, **A.C., vol. 1, pp. 141-148.**

55 Judgment, paras. 642-676; 677-689, **A.C., vol. 1, pp. 141-150.**

56 Judgment, para. 17, **A.C., vol. 1, p. 9.**

57 Judgment, paras. 755-779, **A.C., vol. 1, pp. 162-167.**

of "l'ordre juridique québécois".[58] Citing *Nova Scotia Pharmaceutical Society*[59], the Judgment held that when a "débat judiciaire" is possible between conflicting interpretations, the threshold of unconstitutional vagueness is not met. As to whether the ambiguity of ss. 6 and 13 of ***Bill 21*** met the threshold, the Judgment states at para. 672:

> "En effet, le débat judiciaire ne requiert pas beaucoup plus que deux parties possédant une vision différente du même objet, en l'espèce l'objet législatif."

The essential component of a "débat judiciaire", i.e. a hearing before a forum that meets all the criteria set out at the aforesaid s. 23, and the right thereto, is suspended by such "sterilization". This equates to imposing a condition precedent for a finding of impermissible vagueness that cannot be met. *Nova Scotia Pharmaceutical Society* could neither have anticipated nor intended such a result. If the unattainable precondition and the facts surrounding *Delta Air Lines* may be different, the result is not.

2.2.1b) Applying the correct tests, do ss. 6 and 13 of *Bill 21* create and allow for prohibitions and delegated authority so impermissibly imprecise and arbitrary such that each individually, or both taken together, offend the rule of law and are "*ultra vires*"?

41. The terms that define the prohibition of wearing religious symbols (s. 6) and how it is to be applied and enforced (s. 13) are themselves subjective, ambiguous, contradictory and vague.[60] It is left to the "highest administrative authority" or their "delegate", in each institution covered, to interpret, apply and enforce the prohibition according to their individual and personal perceptions of what is prohibited and what

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58 *Loi sur la laïcité de l'État*, Préambule, 4th para., The term "préponderant", as used therein becomes "paramount" in the English version. Read together with ss. 33 and 34 of ***Bill 21***, the suspension of such rights becomes itself "paramount". Paramountcy of the "*laïcité de l'État"* articulated by ***Bill 21***'s provisions said to operate "malgré les articles 1-38 de la *Charte québécoise*" consolidate the forfeiture of these rights in these respects "dans l'ordre juridique québécois".

59 *Nova Scotia Pharmaceutical Society*, *supra* note 12.

60 Affidavit of M[e] Adam Spiro, paras. 10-14, 16-17, **A.C., vol. 4, pp. 782-783**; Affidavit of Rabbi Alan W. Bright, paras. 6, 8-10, 24-28, **A.C., vol. 4, pp. 778, 780.**

"necessary measures – moyens nécessaires" are available to ensure compliance.[61] Wide variance in application and enforcement between institutions was indeed found to be the case.[62] In institutions with multiple establishments or units there may be multiple "delegates" that exercise such discretion individually, allowing for variance in enforcement even within the same institution. The legislation neither provides for nor assures objective, uniform and coherent application and enforcement. The Judgment does not take into account the lack of clarity of the terms "porter" or "dans l'exercice de ses fonctions" which conditions the prohibition at s. 6, nor the absence of any clear delineation of the spatial footprint or perimeter thereof. Nor is there any restriction of "religious symbols" to those which are visible.[63] The absence of words restricting the term "dans l'exercice de ses fonctions" at s. 6 to "au lieu de travail du personnel de cet organisme", as in s. 10, adds confusion. The difference in drafting is significant. The suspension of the right to inviability of the home provided by s. 7 of the *Québec Charter* adds to the impression that what is prohibited extends to wherever the persons listed in Schedule II, "exercise their functions", including within the privacy of their home or office.[64] What are the limits of the "mesures nécessaires" available for enforcement? If search and seizure is excluded, why then the suspension of the restrictions offered by both *Charters*?[65] The absence of standards limiting such discretion, and the absence of any requirement for prior authorization, adds fuel to the fire. The absence of legislated limits or ministerial regulations or

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61 *Villeneuve* c. *Ville de Montréal*, 2018 QCCA 321, para. 83-84, 87-88, is particularly relevant, (para. 83) "Le spectre très large de la disposition ne permet pas de délimiter convenablement pour le citoyen la sphère de risque à laquelle elle s'applique,…", (para. 87) " Le texte de cette disposition ne prévoit pas de critère ou d'indice permettant de circonscrire son champ d'application, de sorte que ce sont les policiers qui se voient requis de préciser eux-mêmes la norme et d'édicter leurs balises". See also: *Procureur général du Québec c. Gallant*, 2021 QCCA 1701, para. 132 where the minimal precision of a statute or regulation required was stated as the need…"de savoir si celle-ci fournit des indications suffisantes pour qu'un justiciable ordinaire puisse s'y conformer et pour limiter le pouvoir de celui qui est chargé de l'appliquer". (our emphasis)

62 Judgment: paras. 665-667, **A.C., vol. 1, p. 146**; for example, the Judgment establishes: "… certains centres prohibent le port de tout symbole catholique, d'autres permettant le port d'une petite croix et d'un anneau alors que d'autres ne permettent que le port d'une alliance."

63 Judgment, para. 322, **A.C., vol. 1, p. 65.**

64 Judgment paras. 324-325, **A.C., vol. 1, pp. 65-66**; see also Affidavit of M[e] David Assor, para. 16, **A.C., vol. 4, p. 776.**

65 *Québec Charter*, s. 24.1, *Canada Charter*, s. 8.

guidelines permits the discretionary imposition and enforcement of "laïcité – secularism" in an otherwise religious home, Rand J. wrote at p. 140:

> "… no legislative Act can, without express language, be taken to contemplate an unlimited arbitrary power exercisable for any purpose, …there is always a perspective within which a statute is intended to operate…"

42. The two paragraphs of ***Bill 21***'s s. 13 serve different purposes. The 1st paragraph deals with the "means - moyens" deemed necessary to actualize and enforce the prohibition. The second paragraph deals with the "measures – mesures" available to sanction violation. The "moyens nécessaires" can include any and all means for enforcement. There are no uniform standards, rules or guidelines provided and the protections of both *Charters* that might pertain are "sterilized" or suspended. The legislator has clothed those who wield the discretionary authority of s. 13 with respect to the already vague prohibition of s. 6 with almost weather-tight protection from effective review of the "necessary measures" used for enforcement. The legislator is deemed to have intended such near-absolute discretion which offends the rule of law.

43. *Nova Scotia Pharmaceutical* offers no guidance. The Trial Judge clearly erred in applying its instructions as the yardstick to measure impermissible imprecision and vagueness. The absence of a "débat judiciaire" that is assured by the override of the aforesaid s. 23 judicial rights magnifies the effect. These all form part of the "contraintes juridiques et factuelles" which the Trial Judge was obliged to consider. The result is not what the rule of law requires.[66]

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[66] It is not without interest that the Judgment at para. 674 makes reference to the teachings of administrative law to the effect that the same statutory provision may permit several "reasonable" interpretations. Respectfully, the Judgment should have recognized how the limit of reasonability set out in *Delta Air Lines* and *Vavilov* would be exceeded by imposing the threshold of "débat judiciaire", given that s. 23 of the *Québec Charter* makes such "débat judiciaire" not possible.

The absence of ministerial guidelines / "*lignes directrices*" regarding s. 13, viewed from another perspective

44. The absence of ministerial "lignes directrices" with respect to the discretion that s. 13, 1st paragraph, affords is striking. The singularity of this concurrent use of the notwithstanding clauses in both *Charters* and the suspension of the protections they provide gives context to this near-absolute discretion that results. The exercise of that discretion is not subject to prior ministerial direction, guidance, or "verification" after the fact. Such absence of predetermined standards or guidelines is difficult to reconcile with the Minister's obligation to establish "lignes directrices" required by s. 12 of chapter R-26.2.01[67], a statute to which ***Bill 21*** refers but without providing any parallel obligation with respect to "signes religieux", "moyens nécessaires" or "mesures prévues" as used in ss. 6 and 13. The absence of such "lignes directrices" is significant. The principles and guidance that *Vic Restaurant*[68] provides, when properly applied, demonstrate clearly the *ultra vires* and almost absolute discretion that s. 13, 1st paragraph, affords. The legislator has either ignored the directives that the case provides or has intended such exceptional and "untrammelled" discretion. The Trial Judge makes no reference to the guidance that *Vic Restaurant* provides.

45. The remarks of Cartwright J. in *Vic Restaurant* are apposite in every respect:

> "The impugned provisions of by-law no. 1862 appear to me to be fatally defective in that no standard rule or condition is prescribed for the guidance of the Director of Police in deciding whether to give or withhold his approval"[69] (p. 99)
>
> …..
>
> "I agree with my brother Locke that the effect of the by-law is to leave it to the Director of Police without direction to decide whether an

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67 *Loi favorisant le respect de la neutralité religieuse de l'État et visant notamment à encadrer les demandes d'accommodements pour un motif religieux dans certains organismes.*

68 *Vic Restaurant*, *supra* note 15. This case was recently applied by the Court of Appeal though in a different context in *Procureur général du Québec c. Lamontagne*, 2020 QCCA 1137, para. 50.

69 *Vic Restaurant*, *supra* note 15, p. 100; Cartwright J. dismissed the claim that because the Police Chief "was charged with the duty of maintaining the public peace…he is thereby sufficiently instructed as to the standard to be applied and the conditions to be looked for…" The word "nécessaires" following the word "moyens" at s. 13, 1st paragraph, does not satisfy the necessity to be "sufficiently instructed as to the standard to be applied…".

> applicant should or should not be permitted to carry on any of the lawful callings set out in the 41 sections referred to above.
>
> For these reasons I am of the opinion that the impugned provisions of the by-law are invalid." (p. 101) (our emphasis)

For his part, Locke J. wrote:

> "For that body to say that before the Director of Police, in his discretion may prevent its issue by refusing approval, is not to fix the terms but is rather an attempt to vest in the Chief of Police power to prescribe the terms or some of the terms in which the right to a license depends."(p. 82) (our emphasis)

46. In *Raif Holdings Ltd. v. Lake Country (District)*[70] this rule was confirmed and applied, although because of statutory language providing "…an objective, ascertainable requirement…" the appeal to the B.C. Court of Appeal failed. To distinguish *Vic Restaurant*, the Court added "If that discretion is abused in any particular case, a further business licence applicant has recourse through judicial review". The absence of ministerial directives or limitations with respect to "moyens nécessaires" confirms that "…an objective, ascertainable requirement…" is nowhere provided. Sterilization of the judicial rights that both *Charters* provide presents an unscalable obstacle to relevant and efficacious "judicial review."

47. In *McCleery v. Nap. Malenfant Ltée*[71], Fish J, then a judge of the Court of Appeal wrote:

> "Regulatory power cannot be transferred … [without]… a framework within which any discretion delegated to a subordinate authority must operate; if they fail to do so, the subordinate authority will have essentially untrammelled discretion to make decisions on the basis of arbitrary considerations…." (our emphasis)

Here the rule is doubly violated because there is absence of uniform and objective directives or a framework to guide either the "highest administrative authority" or

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70 2018 BCCA 469, paras. 57-59.
71 [1993] R.J.Q. 1043 (C.A.), p. 1048. [*McCleery*].

his/her "deputy". There is neither certainty of uniform application between institutions nor within the same institution.

48. In *Garbeau v. Montréal (Ville de)*, the Superior Court cites *seriatim Vic Restaurant* and *McCleery* and refers to the fourth rule of Professor Garant:

> "Au niveau de l'Administration infragouvernamentale, une délégation implicite d'un pouvoir discrétionnaire ne sera légale que lorsque l'organe à qui le pouvoir discrétionnaire est confié fait exercer ce pouvoir par ses agents en établissant des normes et en gardant un pouvoir de surveillance et de contrôle sur ces agents.
>
> Lorsque l'organe à qui le pouvoir discrétionnaire est confié édicte des normes qui ne sont pas assez précises, cela revient à conférer une « discrétion » trop large à l'agent qui prend la décision, et empêche ainsi les administrés de savoir comment seront affectés leurs droits. […]."[72] (our emphasis)

In *Morton v. Canada (Fisheries and Oceans)*, 2015 FC 575, para. 83 instructs:

> "For the exercise of a delegated power to be proper, the delegation must provide for standards, rules and conditions to guide the decision-making process…" (our emphasis)

In *Ontario (Attorney General) v. G.,* the Supreme Court gives perspective to the adverse effects of such discretionary power:

> "[91] Un pouvoir discrétionnaire absolu a pour avantage que les possibilités de l'adapter à tout contexte factuel sont infinies, mais il a clairement pour inconvénient d'ouvrir la porte à des décisions fondées sur [traduction] « les volontés et les caprices d'une personne ou d'un groupe de personnes » (Roach (2004), p. 107, citant P. Birks, « Three Kinds of Objections to Discretionary Remedialism » (2000), 20 *Uwa. L. Rev.* 1, p. 15). Qui plus est, ce type de pouvoir ne favorise pas un raisonnement transparent; en effet, si le décideur peut faire ce qu'il veut, il est alors moins enclin à expliquer le fondement de sa décision. À l'inverse, l'avantage du pouvoir discrétionnaire fondé sur des règles est qu'il peut être exercé dans différents contextes de manière prévisible."[73] (our emphasis)

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72 2015 QCCS 5246, paras. 299-304, 311.

73 2020 SCC 38, para. 91 [*Ontario (Attorney General) v. G.*].

49. The Judgment's errors permit the State, through ss. 6 and 13 of ***Bill 21***, to bestow and/or delegate a discretion whose exercise is neither subject to clearly stated and objective standards, nor to ministerial directives and guidance. Uniformity and coherence in application and enforcement is neither assured nor likely, and indeed has not been the case.[74] The rule of law "…vouchsafes to the citizens…a stable, predictable and ordered society in which to conduct their affairs…(and)…provides a shield for individuals from arbitrary state action."[75] The contested sections, twinned with the sterilization of judicial rights, satisfy neither part of the equation of the rule of law[76] and are *ultra vires* because they offend "la primauté du droit".

4. Violation de l'article 3 de la *Charte canadienne* - éligibilité aux élections provinciales

4.4 Le Juge erre en refusant de conclure que l'article 6, et, les paragraphes 1 et 6 de l'Annexe II de la *Loi 21* violent l'article 3 de la *Charte canadienne.*

4.4a) Does the exclusion of duly elected MNA's who wear religious symbols from consideration for and/or accession to the positions of President and Vice-President of the National Assembly or Minister of Justice violate s. 3 of the *Canada Charter*?

50. *Charter* provisions are to be interpreted and applied in a liberal and purposive manner to capture, fully, the rights and freedoms fostered or protected.[77] The Trial Judge accurately found that s. 8 of ***Bill 21*** infringes s. 3 of the *Canada Charter*. By ending there, he undershot the mark, defining too narrowly what s. 3 captures and missed the full scope of what it addresses.[78] Parallel with the violations of s. 3 found, the Judgment, should have but did not find the automatic exclusion of any duly

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74 Judgment, paras. 665-667, **A.C., vol. 1, p. 146.**

75 *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, para. 70.

76 The fact that Schedule II, like s. 15 of ***Bill 21*** affects those who, by their oath and status, are officers of the court-*auxiliaires de la justice* brings the issue home. They must, by their oath, uphold a law which is impermissibly imprecise.

77 *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, p. 344; *Figueroa v. Canada (Attorney General),* [2003] 1 S.C.R. 912, para. 20 [*Figueroa*].

78 Judgment, paras. 885-921, **A.C., vol. 1, pp. 191-196.**

elected MNA wearing religious symbols from being considered as a candidate for the positions of President or Vice President of the National Assembly or Minister of Justice by way of s. 6 of ***Bill 21*** and the 1st and 6th paragraphs of Schedule II thereof, as equally problematic.[79]

51. The Judgment legitimizes the creation of distinct classes of elected MNA's only one of which is "privileged" to be considered for such positions. In *Reference re: Prov. Electoral Boundaries (Sask)*, Justice McLachlin, as she was then, wrote:

> "The purpose of the right to vote enshrined in s. 3 of the *Charter* is not equality of voting power *per se*, but the right to "effective representation" Ours is a representative democracy. Each citizen is entitled to be represented in government. Representation comprehends the idea of having a voice in the deliberations of government as well as the idea of the right to bring one's grievances and concerns to the attention of one's government representative; as noted in *Dixon v. B.C. (A.G.)*, 1989 CanLII 248 (BC SC), [1989] 4 W.W.R. 393, at p. 413, elected representatives function in two roles – legislative and what has been termed the "ombudsman role"."[80] (our emphasis)

The affront is doubly consequential in that the right to petition the National Assembly enshrined by s. 21 of the *Québec Charter* is itself "sterilized", neutralizing these other functions of s. 3 guarantees outlined by her.

52. Section 3 of the *Canada Charter* creates *(i)* "… an obligation on Parliament not to interfere in a fair election"[81] and recognizes that *(ii)* "the principle of electoral fairness flows directly from a principle entrenched in the Constitution: that of the political equality of citizens…"[82] and provides that *(iii)* "legislation that bestows a benefit upon some political parties, but not others, requires scrutiny".[83] If the benefit is conferred upon some candidates but not on others, the affront to "fairness" and "democracy", and to s. 3 is neither different nor any less. The statutory exclusion for an elected

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79 The Judgment at paras. 920-921, **A.C., vol. 1, p. 196,** found that s. 8 of ***Bill 21*** effectively bars a duly elected MNA from taking his/her seat in the National Assembly contrary to s. 3 of the *Canada Charter*.

80 [1991] 2 S.C.R. 158 at p. 181 [*Reference re: Prov. Electoral Boundaries (Sask)*].

81 *Figueroa*, *supra* note 77, p. 945, para. 51; That obligation is as well incumbent on the National Assembly.

82 *Ibid.*, p. 945, para. 51.

83 *Ibid.*, p. 944, paras. 48, 50.

MNA who wears "religious symbols" from being considered for the positions of President or Vice President or of Minister of Justice equates to the State messaging preference for a particular profile of MNA, interfering in an election which should offer a level playing field to all candidates without exterior influence. This is incompatible with s. 3 of the *Canada Charter*. Indirect violation of s. 3 does not diminish the gravity of either the violation or the error of the Judgment.

53. In *Mouvement laïque québécois*[84] it was said that the pursuit of a free and democratic society requires the State to encourage everyone to participate freely in public life and that:

> "The state may not act in such a way as to create a preferential space that favours certain religious groups and is hostile to others. It follows that the state may not by expressing its own religious preference, promote the participation of believers to the exclusion of non-believers or vice versa."[85] (our emphasis)

The reference to *Figueroa* and *Reference re: Prov. Electoral Boundaries (Sask)* that precedes that statement links the prohibition directly to s. 3 of the *Canada Charter*. The State preference is expressed in ***Bill 21*** towards non-believers, doing precisely what is forbidden to do so as to preserve the fairness of the electoral process. Reliance on *Figueroa* and *Reference re: Prov. Electoral Boundaries (Sask)*, cases dealing front and centre with s. 3 of the *Canada Charter*, makes the following statement no less applicable herein.[86]

> "[75] I would add that, in addition to its role in promoting diversity and multiculturalism, the state's duty of religious neutrality is based on a democratic imperative. The rights and freedoms set out in the *Quebec Charter* and the *Canadian Charter* reflect the pursuit of an ideal: a free and democratic society. This pursuit requires the state to encourage everyone to participate freely in public life regardless of their beliefs." (our emphasis)

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84 *Mouvement laïque québécois v. Saguenay (City)*, [2015] 2 S.C.R. 3.
85 *Ibid.*, para. 75.
86 *Ibid.*, para. 75.

54. By creating two classes of MNA's, those that may be considered for election/selection to higher office and those who may not, the State signals a preference violating this "democratic imperative". As between candidates, one who wears religious symbols and one who does not, the State confers a benefit on the latter that it does not on the former. That the benefit arises only after the election is of no moment. The effect of skewing the election unfairly in a State oriented and preferred direction, by putting its weighty thumb on what should be an even scale, is precisely the mischief that s. 3 is there to suppress.[87] Section 6, and the 1st and 6th paragraphs of Schedule II, read together frustrate a "free and fair" election run "without state interference" and "without providing a benefit" to one candidate rather than the other, precisely what s. 3 of the *Canada Charter* is there to protect. It is incumbent upon this Honorable Court, as the guarantor of the Constitution, to correct these errors pursuant its s. 52(1) of the *Constitution Act, 1982.*[88]

5. Recours injustifié aux clauses dérogatoires

5.1 Le juge erre en concluant que l'arrêt *Ford* dispose de la question du recours aux clauses dérogatoires.

5.1a) Was the Trial Judge correct in determining that *Ford v. Quebec (Attorney General)* and vertical *stare decises* was dispositive of any challenge to Québec's simultaneous, concurrent preemptive and *holus bolus* recourse to the notwithstanding clauses of both the *Canada* and *Québec Charters*?

55. The Superior Court considered *Ford v. Quebec (Attorney General)*[89] as a "fin de non-recevoir" but fails to consider that judgment was *(i)* rendered when the *Canada*

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87 It is no less clear that the aforementioned sections of ***Bill 21*** violate s. 19 of the very legislation that created the National Assembly (*Loi sur l'Assemblée nationale*, RLRQ c.A-23.1). Save for the mandatory distinction in the legislation between Government and Opposition MNA's pursuant to s. 19, these legislative officers are to be elected at the beginning of the first sitting of the National Assembly from among "its Members" - "parmi les députés"- not from among only part of its Members.

88 *Ontario (Attorney General) v. G., supra* note 73, para. 98 : "Néanmoins, les tribunaux demeurent les « gardiens de la Constitution et des droits qu'elle confère aux particuliers » (*Hunter c. Southam Inc.*, [1984] 2 S.C.R. 145, p. 169) – « la déférence s'arrête là où commencent les droits constitutionnels que les tribunaux sont chargés de protéger » (*Doucet-Boudreau c. Nouvelle-Écosse (Ministre de l'Éducation)*, 2003 CSC 62, [2003] 3 S.C.R. 3, para. 36). Il en est ainsi parce qu'il [TRADUCTION] « appartient nettement [aux tribunaux] de préciser l'état du droit » (*Marbury c. Madison*, 5 U.S. (1 Cranch) 137 (1803), p. 177)."

89 [1988] 2 S.C.R. 712 [*Ford*].

Charter was in its infancy *(ii)* long before precedents of equal stature were reversed by subsequent jurisprudence of the Supreme Court, *(iii)* deals only with the procedural regularity of involving s. 33 of the *Canada Charter* copying its terms *verbatim* and *(iv)* fails to fully consider either the consequences of "sterilizing" *holus bolus* all human rights described as "intrinsic", "fundamental", "guaranteed by collective will" provided for at ss. 1-38 of the *Québec Charter*, nor the effect of such "sterilization". The failure or refusal by the Trial Judge to distinguish *Ford* and its application as a "fin de non-recevoir" fatal to reconsidering its authority, constitutes reviewable error that this Honorable Court must correct.

56. To so decide pursuant to vertical *stare decisis* denies the nature of Canada's Constitution as a "living tree"[90] and fossilizes remarks that address the form in which the National Assembly might invoke the notwithstanding clause of the *Canada Charter*[91], while leaving the fundamental rights set out in the *Québec Charter* intact. Much water has passed under the bridge of constitutional interpretation since – waters that have been roiled many times by revisiting principles that were previously taken as settled law.[92]

57. As a rule of common law, *stare decisis* "…met en balance les impératifs que sont le caractère définitif et la stabilité avec la reconnaissance du fait qu'une juridiction inférieure doit pouvoir exercer pleinement sa fonction…".[93] The reference to function referred to the place of the Superior Court as guardian of the Constitution secured by the dual provisions of ss. 52(1) and 96 of the *Constitution Act, 1982*. While "…la

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90 *Fédération des policiers et policières municipaux du Québec c. Procureur général du Québec*, 2021 QCCS 4105, para. 1: "Alors que l'« *arbre vivant de la Constitution* », concept applicable aussi à la *Charte canadienne des droits et libertés*, devient un bonzaï chétif en temps de pandémie, il constitue depuis le début de ce siècle, un chêne géant lorsqu'il s'agit de la liberté d'association garantie par l'article 2d) de la Charte."; *Edwards v. Canada (Attorney General)*, 1929 CanLII 438 (UK) JCPC), [1930] A.C. 124 (P.C.) at p.136.

91 The Judgment reproduces the relevant portion of the Supreme Court's judgment in *Ford* at para. 724, **A.C., vol. 1, pp. 157-158.**

92 *(i) Health Services and Support – Facilities Subsector Bargaining Assn. v. British Columbia*, 2007 SCC 27; *(ii) Ontario (Attorney General) v. Fraser*, [2011] 2 S.C.R. 3 and *(iii) Saskatchewan Federation of Labour v. Saskatchewan*, 2015 SCC 4 [*Saskatchewan Federation of Labour*] reversing what the trilogy of the *Renvoi albertain* decided. In the latter case it was the Trial Judge that departed from that precedent, a departure later confirmed by the Supreme Court.

93 *Canada (Attorney General) v. Bedford*, [2013] 3 S.C.R. 1101, para. 44 [*Bedford*].

juridiction inférieure ne peut faire abstraction d'un précédent qui fait autorité, et la barre est haute…"[94] when new legal issues are raised or there is significant change in the circumstances this threshold is met. In *Bedford*, the lower court was deemed entitled to revisit *Renvoi sur la prostitution de 1990*[95], and rule on whether the laws in question violated s. 7 of the *Canada Charter* on the dual basis that *(i)* the previous case had not dealt with all the independent interests s. 7 protected and *(ii)* "…le caractère arbitraire, la portée trop grande et le caractère totalement disproportionné qui sont allégués, des notions qui ont en grande partie vu le jour au cours des 20 dernières années."[96] Furthermore, "…le sujet peut être réexaminé lorsque de nouvelles questions de droit sont soulevées par suite d'une évolution importante du droit ou qu'une modification de la situation ou de la preuve change radicalement la donne."[97] However valid and compelling, all rules of common and statute law are subordinate to the Constitution and "…ne saurait avoir pour effet d'obliger un tribunal à valider une loi inconstitutionnelle. À son avis, une juridiction inférieure ne doit pas s'en tenir au rôle de [traduction] « simple exécutant » qui constitue un dossier et tire des conclusions sans se livrer à l'analyse du droit (m.i., par. 25)".[98]

58. *Stare decisis* must yield to the provisions of the Constitution itself and applies only to that which was specifically decided by the higher court. The bar permitting the upending of binding precedent is high, but not so high as to estop the Superior Court from deciding questions that are fundamentally different when that Court, itself, finds the scope and circumstances surrounding its exercise novel and "*a priori exorbitant*".[99] The Trial Judge noted the singularity of the simultaneous use of both *Charters*' "notwithstanding" clauses and their combined effect of sterilizing virtually all the fundamental rights that form part of the rule of law, that go back, in some cases, as far as the *Magna Carta.*[100] That alone would have been sufficient to distinguish *Ford*.

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94 *Ibid.*, para. 44.
95 *Reference re ss. 193 and 195.1(1)(C) of the criminal code (Man.)*, [1990] 1 S.C.R. 1123.
96 *Bedford*, *supra* note 93, para. 45.
97 *Ibid.*, para. 42.
98 *Ibid.*, para. 43; the Court adds at para. 44 after citing Appellant's aforesaid submissions: "Je partage cet avis".
99 Judgment, para. 755, **A.C., vol. 1, p. 162.**
100 Judgment, para. 761, **A.C., vol. 1, pp. 163-164.**

59. How do we reconcile the essential differences found by the Judgment, with being bound by *Ford* on the basis of vertical *stare decisis*?

> (i) "…la Loi 21 constitue le premier texte législatif qui déroge simultanément aux articles 1 à 38 de la Charte québécoise et 2 et 7 à 15 de la Charte canadienne" (para. 768) (our emphasis)
>
> (ii) "…en agissant ainsi le constituant suspend, à l'égard de la Loi 21, presque l'ensemble des droits et libertés dans la province de Québec." (para. 768)
>
> (iii) "Cependant, à l'évidence, et il s'agit là d'une différence fondamentale et très significative, les protections correspondantes de la Charte québécoise demeuraient en vigueur" (para. 766) (our emphasis)

How do we reconcile this when the Judgment refers to the Superior Court as:

> "…gardien de la primauté du droit et de la Constitution… (qui)…se doivent d'éclairer cette connaissance des fruits de leurs expertises". (para. 776)

60. The "primauté du droit" includes the principles of natural justice, *audi alteram partem* and *nemo judex in sua causa*, which the suspension of the right to a "full and equal", "public and fair" hearing before an "independent and impartial tribunal" set out at s. 23 of the *Québec Charter* encapsulates. The suspension of all judicial rights provided in both *Charters*, and, as corollary, the suspension of what "la primauté du droit" includes, negates the inherent jurisdiction of the Superior Court as guardian of the Constitution. The "primauté du droit" is a constitutional imperative, as much a part of Canada's Constitution as both ss. 33, s. 52(1) and s. 96. The competence of the Superior Court, as a court of inherent jurisdiction buttresses its role as Québec's s. 96 court.[101]

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101 *Three Rivers Boatman Limited c. Conseil Canadien des Relations Ouvrières et al.,* [1969] R.C.S. 607, pp. 615-616 [*Three Rivers Boatman*]: "La Cour supérieure devenait ainsi nantie du pouvoir de surveillance, basé sur la *common law*, … (qui) …vient du droit public anglais introduit au Québec lors et par suite de la cession."; *WestJet v. Chabot*, 2016 QCCA 584, para. 41.

61. The protection of the rule of law is directly linked to the inherent jurisdiction of the Superior Court[102]:

> "[47] As Chief Justice McLachlin affirmed in *Trial Lawyers Association of British Columbia*, s. 96 courts, notably, have a special constitutional role to play in terms of access to justice:
>
> > The s. 96 judicial function and the rule of law are inextricably intertwined. As Lamer C.J. stated in *MacMillan Bloedel*, "[i]n the constitutional arrangements passed on to us by the British and recognized by the preamble to the *Constitution Act, 1867*, the provincial superior courts are the foundation of the rule of law itself" (para. 37). The very rationale for the provision is said to be "the maintenance of the rule of law through the protection of the judicial role":"

62. Left to stand, his decision fetters his "core competence" as a *puisne* justice of the Superior Court that was most recently defined in *Reference re Code of Civil Procedure (Que.), art. 35.*[103] That case was decided after judgment had been rendered herein. The principle remains, however, that the aforementioned judgment has become precedent that cannot now be ignored.

5.1b) Does the "sterilization" and/or "suspension" as respects *Bill 21*, of all of the fundamental rights set out at ss. 1-38 of the *Québec Charter* and ss. 2 and 7-15 of the *Canada Charter*, create impermissible *(i)* restraints to access to justice and *(ii)* reduction of and interference with the core competence of the Superior Court in violation of s. 96 of the *Constitution Act, 1867*?

63. The Supreme Court determined that "…même en l'absence de création d'une cour parallèle, les cours supérieures peuvent être affaiblies au point de ne plus pouvoir s'acquitter de leur rôle constitutionnel. Il en est ainsi lorsque le législateur s'ingère de manière inadmissible dans l'exercice de la compétence fondamentale, par

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102 *Newfoundland and Labrador (Attorney General) v. Uashaunnuat (Innu of Uashat and of Mani-Utenam*, 2020 SCC 4.

103 2021 SCC 27 [*Reference re Code of Civil Procedure (Que.), art. 35*].

exemple, en l'encadrant au point de « mutiler[…] » l'essence même des cours supérieures" (*MacMillan Bloedel*, para. 37)."[104] (our emphasis)

64. The core competence of the Superior Court is so constitutionally entrenched by s. 96 such that "…ni le parlement ni les législateurs ne peuvent porter atteinte à leur statut"[105], in particular, "Seules les cours supérieures disposent de pouvoirs inhérents découlant de leur nature même et ayant spécialement pour objectif de leur permettre d'assurer la primauté du droit au sein de notre système juridique…".[106] The role and authority of the Superior Court benefits from "…une protection constitutionnelle et ils ne peuvent donc leur être retirés…"[107] that includes "…le pouvoir de réviser l'exercice des pouvoirs publics afin de s'assurer que cet exercice soit conforme à la loi et que les citoyens soient protégés contre l'arbitraire de l'État (*Crevier; UES, local 298 c. Bibeault*, [1988] 2 R.C.S. 1048, p. 1090; *Dunsmuir c. N.B.*, 2008 CSC 9, [2008] 1 R.C.S. 190, par. 31; *Vavilov*, par. 24)".[108]

65. The rule of law, grounded in the separation of judicial, legislative and executive functions, as much obliges as it empowers the judiciary with "…la tâche d'interpréter, d'appliquer et de dire le droit…".[109] More specifically, the Court held "Cette séparation permet aux cours de justice de mettre en œuvre les trois facettes fondamentales de la primauté du droit que sont l'égalité de tous devant la loi, la création et le maintien d'un ordre réel de droit positif et la surveillance de l'exercice des pouvoirs publics…".[110]

66. The simultaneous suspension of every fundamental right covered by both *Charters*, save those few that escape the "notwithstanding" clauses, creates a privative or preclusive clause that is no less overreaching than the one which *Crevier*[111]

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104 *Ibid.*, para. 63; See also: *Trial Lawyers Association of British Columbia v. British Columbia (Attorney General)*, [2014] 3 S.C.R. 31, paras. 30-32, 37-39 [*Trial Lawyers Association*].
105 *Reference re Code of Civil Procedure (Que.), art. 35*, *supra* note 103, para. 62.
106 *Ibid.*, para. 51.
107 *Ibid.*
108 *Ibid*.
109 *Ibid.*, para. 46; *Ontario (Attorney General) v. G, supra* note 73, para. 87; *Canada (Attorney General) v. Hislop*, [2007] 1 S.C.R. 429, para. 79.
110 *Reference re Code of Civil Procedure (Que.), art. 35*, *supra* note 103, para. 47.
111 *Crevier v. A.G. (Québec) et al*, [1981] 2 S.C.R. 220 [*Crevier*].

determined to be *ultra vires* the Province. Reflecting upon the suspension of attorney/client privilege, the Trial Judge notes: "on peut donc raisonnablement soutenir qu'un justiciable devrait pouvoir contester cet usage du législateur de la clause dérogatoire qui porte sur la laïcité"[112] but failed to see the suspension of rights set out at ss. 23, *et seq.* of the *Québec Charter* as precluding that very possibility.

67. *Three Rivers Boatman* recognized that Canadian administrative law, and in particular the Superior Court's role in judicial review "…nous vient du droit public anglais introduit au Québec lors et par suite de la cession."[113] Juxtaposed to the Supreme Court's recognition of the role of s. 96 as *(i)* "…la pièce maîtresse du système judiciaire unitaire…"[114], …. *(ii)* "…la pierre angulaire de ce système et à agir comme une « force unificatrice » permettant de développer le droit à l'échelle nationale"[115], and *(iii)* "Les cours supérieures forment un réseau de tribunaux connexes ayant pour rôle d'unifier et d'uniformiser la justice au Canada."[116], does the ousting of access to the Superior Court, via the suspension of judicial rights, impede development of a coherent and uniform public and administrative law across the country?

68. The Supreme Court recognized in *Trial Lawyers Association*[117] that "without an accessible forum for the adjudication of disputes, the rule of law is threatened…". There, the obstacle was access fees. Here the obstacle is far more formidable, i.e. the concurrent "sterilization" or suspension, in respect of the interpretation and application of ***Bill 21***'s most contentious provisions, of all judicial rights provided in both *Charters*.

69. As noted in *Uber Technologies Inc.*:

> "The rule of law, accordingly, requires that citizens have access to a venue where they can hold one another to account (*Jonsson v. Lymer*,

112 Judgment, para. 778, **A.C., vol. 1, pp. 166-167.**
113 *Supra* note 100, p. 616.
114 *Reference re Code of Civil Procedure (Que.), art. 35*, *supra* note 103, para. 29.
115 *Ibid.*, para. 39.
116 *Ibid.*, para. 43.
117 *Trial Lawyers Association, supra* note 104, para. 38, citing *Hryniak v. Mauldin* [2014] 1 S.C.R. 87, para. 26.

> 2020 ABCA 167, at para. 10 (CanLII)). Indeed, "[t]here cannot be a rule of law without access, otherwise the rule of law is replaced by a rule of men and women who decide who shall and who shall not have access to justice" (*B.C.G.E.U. v. British Columbia (Attorney General)*, 1988 CanLII 3 (SCC), [1988] 2 S.C.R. 214, at p. 230). Unless private parties can enforce their legal rights and publicly adjudicate their disputes, "the rule of law is threatened and the development of the common law undermined" (*Hryniak v. Mauldin*, 2014 SCC 7, [2014] 1 S.C.R. 87, at para. 26). Access to civil justice is paramount to the public legitimacy of the law and the legitimacy of the judiciary as the institution of the state that expounds and applies the law."[118] (our emphasis)

70. The novel combined and *holus bolus* use of both notwithstanding clauses creates the perfect privative or preclusive clause that offends both the "rule of law" and the "core competence" of the Superior Court. The suspension of all judicial rights set out at s. 23 *et seq.* of the *Québec Charter*, along with those guaranteed in the *Canada Charter* results, with respect to ***Bill 21***'s provisions, in the illegal erosion of the constitutional guarantees of both ss. 96 and s. 52(1) of the *Constitution Act, 1982*. While the Province may have the structural and procedural competence to neutralize the substantive rights of each *Charter* by way of their respective ss. 52 and 33, used individually, the concurrent use by the Province of both makes same *ultra vires* because of their combined effects upon the functioning of the Superior Court as guarantor of the "rule of law" and its role as a unifying judicial force. None of this was ever canvassed or decided in either *Ford* or *Devine*[119] because the rights of the *Québec Charter* had been left intact.

71. This question does not speak to the legislator's political choice but to its constitutional effects and consequences. As in *Reference re Code of Civil Procedure (Que.), art. 35*, it is legitimate to question whether the exercise by the Province of a structural competence it has constitutes overreach, when its employ substantially impairs the Superior Court's inherent purpose, role and jurisdiction. As the guardian of the

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118 *Uber Technologies Inc. v. Heller*, 2020 SCC 16, Brown J. at para. 111.

119 *Devine v. Quebec (Attorney General),* [1988] 2 S.C.R. 790 [*Devine*]; The fact that in that case the Supreme Court refers to s. 3 of the *Québec Charter* as the basis for invalidating several sections of the *Charte de la langue française* and its regulations highlight the essential differences that must be made.

Constitution, s. 96 as much obliges as it empowers the Superior Court, and now this Honorable Court, to protect and defend same even *proprio motu.*[120] What was said in *Amax Potash Ltd. Etc. v. The Government of Saskatchewan,* is apposite here:

> "On dit qu'un État est souverain et qu'il n'appartient pas aux tribunaux de juger de la raison d'être ni de la sagesse de la volonté expresse du législateur. En tant que déclaration de principe, c'est indubitablement exact, mais dans un État fédéral, le principe général doit céder devant les exigences de la constitution qui définit les limites de la souveraineté et de la suprématie. Les tribunaux ne mettront pas en doute la sagesse des textes législatifs qui, aux termes de la Constitution canadienne, relèvent de la compétence des législatures, mais une des hautes fonctions de cette Cour est de s'assurer que les législatures n'outrepassent pas les limites de leur mandat constitutionnel et n'exercent pas illégalement certains pouvoirs."[121] (our emphasis)

72. It is reviewable error on the part of the Superior Court to have declined to act on the basis of *stare decisis*. It is difficult to square the circle in view of the Judgment's recognition that access to the courts that protect the citizen from the State's excesses[122] is the very thing that is stymied by the "sterilization" of rights that it recognized. "In the context of constitutional adjudication, deference is a conclusion not an analysis".[123] It is now this Court's obligation to speak to that issue. The unconstitutional exercise of power by one or another level of government that compromises and hobbles the "core competence" and the jurisdiction of the Superior Court per s. 96 can and must be sanctioned so as to protect the supremacy of Canada's constitution itself. By the terms of s. 52(1) of the *Constitution Act, 1982* it is neither a request to nor the Order of a Court that renders a "règle de droit" inoperative, but its "inconsistency" with the Constitution.[124]

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120 *Ontario (Attorney General) v. G, supra* note 73, paras. 85-87.

121 [1977] 2 S.C.R. 576, p. 590.

122 Judgment, para. 733: "…le recours aux tribunaux demeure, dans une société de droit, libre et démocratique, jouissant d'une appareil judiciaire impartial et indépendant, le meilleur rempart contre les pouvoirs de l'État. La quête de la justice, dans son sens le plus élémentaire et le plus noble, doit pouvoir faire l'objet d'un recours en justice et un tribunal de droit commun, comme la Cour supérieure du Québec, doit voir à préserver l'existence de cette possibilité." (our emphasis)

123 *Saskatchewan Federation of Labour*, *supra* note 92, para. 76.

124 *Re Manitoba Language Rights*, *supra* note 28, pp. 745-746; refers to the text of s. 52(1) and the Court instructs: "Le mot « inopérantes » signifie qu'une règle de droit ainsi incompatible avec la Constitution est inopérante pour cause d'invalidité."

PART IV – CONCLUSIONS

THE APPELLANT L'ASSOCIATION DE DROIT LORD READING ASKS THE COURT OF APPEAL TO:

ALLOW the Appellant's appeal;

SET ASIDE the Judgment rendered in first instance in file number 500-17-109731-193 of the records of the Superior Court of Québec, District of Montreal, dated April 20, 2021;

RENDER the decision that should have been rendered in first instance with respect to the provisions of the *Loi sur laicité de l'État* RLSQ, c. L-0.3 ("***Bill 21***");

DECLARE that ss. 6, 13, 14, 15 and the 1st and 6th paragraphs of Schedule II of ***Bill 21***, *ultra vires*, unconstitutional, incompatible with the rule of law and inoperative;

DECLARE that s. 6 of ***Bill 21***, alone or read together with and s. 13 of ***Bill 21***, and the obligations and prohibitions that flow therefrom or consequent therewith, are so vague, incoherent, contradictory, not clearly discernable in advance, subjective and arbitrary that they violate the rule of law;

DECLARE that s. 13, paragraph 1 of the aforesaid ***Bill 21*** and the obligations and powers provided therein or consequent therewith provide such untrammelled and therefore arbitrary discretion that they violate and are incompatible with the rule of law;

DECLARE that s. 6 read together with the 1st and 6th paragraphs of Schedule II of ***Bill 21*** violates and is incompatible with s. 3 of the *Canada Charter* and s. 52(1) of the *Constitution Act, 1982*;

DECLARE and REAFFIRM that the Judgment in first instance was and is correct in affirming that the simultaneous and concurrent recourse by the Province to the notwithstanding clauses of both the *Québec* and *Canada Charters* at ss. 33 and 34 of ***Bill 21*** "sterilize" almost the entirety of the fundamental human rights set forth at

ss. 1-38 of the *Québec Charter of Human Rights and Freedoms* and at ss. 2 and 7-15 of the *Canada Charter*, some of which go back as far as the *Magna Carta*;

DECLARE that ss. 33 and 34 of ***Bill 21***, taken together with the "sterilization" of the fundamental rights described above, renders their preemptive, simultaneous and concurrent use and application, in the present cause, incompatible with the rule of law, s. 96 *et seq.* of the *Constitution Act, 1867* and s. 52(1) of the *Constitution Act, 1982*;

DECLARE that ss. 33 and 34 of ***Bill 21*** taken together impairs impermissibly the core competence and inherent jurisdiction of the Superior Court of Québec as at s. 96 Court;

DECLARE that the "sterilization" of such rights, properly and correctly found as such by the Judgment in first instance is incompatible with the preamble of the *Loi sur l'Assemblée nationale* RLRQ, c. A-23.1 and its role as a guarantor of "the inalienable rights of the people of Québec";

DECLARE that ss. 33 and 34 of ***Bill 21*** invoked together are inoperative;

RENDER such other Order as it might relate to the pending appeal of *Lauzon, et al.* in file No. CAM-500-09-029545-217 as may be appropriate, but which is not in conflict with Judgment to be rendered herein;

CONDEMN Respondent to pay judicial costs both in first instance and in appeal;

SUBSIDIARILY, AND IN THE ALTERNATIVE, SHOULD THE PRESENT APPEAL BE DISMISSED:

(i) **DECLARE** that paragraphs 1120–1121 and 1124 of the aforesaid Judgment was properly decided;

(ii) **DECLARE AND RECOGNIZE** the public interest nature of the present Appeal; and

(iii) **ORDER** each party to pay its own judicial costs both in first instance and in appeal.

RESPECTFULLY SUBMITTED

Montréal, December 2, 2021

Robinson Sheppard Shapiro

Robinson Sheppard Shapiro LLP
(Me Theodore Goloff)
Lawyers for L'Association de droit Lord Reading

PART V – AUTHORITIES

Jurisprudence **Paragraph(s)**

Jurisprudence *(cont'd)* **Paragraph(s)**

Appellant's Argument | Authorities

Jurisprudence *(cont'd)* | **Paragraph(s)**

Doctrine **Paragraph(s)**

ATTESTATION

We undersigned, Robinson Sheppard Shapiro LLP, hereby attest that the above Brief is in compliance with the requirements of the *Civil Practice Regulation of the Court of Appeal*.

Montréal, December 2, 2021

Robinson Sheppard Shapiro

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(Me Theodore Goloff)
Lawyers for L'Association de droit Lord Reading